

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4201

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRISTOL SPRING MANUFACTURING CO.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
RESPONDENT BRISTOL SPRING MANUFACTURING CO.

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No. 77-4201

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRISTOL SPRING MANUFACTURING COMPANY,

Respondent.

BRIEF FOR
BRISTOL SPRING MANUFACTURING COMPANY

STATEMENT OF THE ISSUE

Did the National Labor Relations Board properly
certify the Union?

STATEMENT OF THE CASE

This matter is before the Court on the National
Labor Relations Board's petition that its Order (A 1),¹
231 NLRB No. 85, directing the Company to bargain, be
enforced. The Company prays that enforcement be denied
since the Board's certification of the Union (A 88,
Case No. 1-RC-14258), was improper because the Company's
objections to the representation election required the
Board to set aside the election or, at a minimum, direct
a hearing.

¹

(A-) refers to pages in the appendix.

(1-) refers to the certified record.

After a representation petition was filed in the NLRB Regional Office, the Company and the Union entered into an election agreement (A 37, 38). Because certain voters were challenged, the initial election result did not produce a winner. (A 38 Item 10, 11). Subsequently, the Company stipulated that one ballot should not be counted (A 44) and the election tally was modified to show a one vote majority for the Union (A 70).

The Company's objections to the election alleged inter alia:

(1) the Union had improperly offered and given financial benefits to employees during the pre-election period, and

(2) employees had been given the impression of U. S. Government and National Labor Relations Board endorsement of the Union. (A 40, 41 Items 1 and 3).

Thus, the Company moved that the election be set aside. (A 42).

During the election campaign, the Union had filed an unfair labor practice charge. On February 19, 1976 Union representatives arranged for two employees to come to the Union hall during their lunch period to give information in support of the Union's allegations to a Regional Office NLRB agent assigned to investigate the matter. When the employees were invited, they were told the Union would "take care [of] lunch." (A 86)

At the Union hall, the NLRB agent, Union representatives and the employees met "in a group" and the NLRB agent prepared statements.

During the course of the meeting, the Union representatives, the NLRB agent and the employees shared a lunch paid for by the Union. (A 86).

The NLRB agent conveyed the impression that he was opposed to the Company. As one employee stated in an affidavit later submitted to the Board:

There were a few things that the NLRB man said that made me think he was against [Company president] Ben Hittleman. He made comments during the taking of the statement like "That's a good point," "We will get him with that one" I figured the NLRB man took a disliking to Ben and was on the other side. (A 87).

During the meeting, one of the employees was told the Union would forward him a payment for attending. (A 86). Three other employees were interviewed that day after they finished work. The Union paid \$5.00 to each of the five employees. (A 50).

The Union conveyed the impression of NLRB endorsement by sending a letter to all employees on February 23, 1976 which stated that "an agent of the National Labor Relations Board . . . has been here and has been getting information about the illegal [actions of the Company] (A 48).

Again on March 10, 1976 the Union suggested government endorsement of the Union by distributing a

circular reciting certain benefits such as fully-paid hospital insurance, highest wages, and other fringe benefits which would be "guaranteed by the UAW and/or the United States Government" by voting for the Union (A 74).

On March 3, 1976 the Union conducted another meeting after working hours attended by at least four employees; two of whom had been the recipients of the earlier Union payment. (A 50). No NLRB agent was present, but the Union obtained information from employees to support its allegations against the Company. The meeting lasted between one and two hours. (A 51). Each employee was paid \$20 for attending this Union meeting. (A 51). The employees were also told by the Union representative that the Union would pay for "anything from the local diner" (A 50).

Other employees were advised of the potential for payment if they attended these meetings. A Union intermediary solicited an employee to attend by promising it would be "worth [his] while" (A 51). Employees were aware of the Union payments "through the grapevine" (A 51).

The Company's election objections were investigated by the same Board Agent who had earlier been involved (A 6). The investigation consisted of a series of individual interviews with employees, and Company and

Union representatives. On the basis of this investigation, the Acting Regional Director concluded that the Company's objections should be overruled, that no evidentiary hearing was necessary, and that the Union should be certified. (A 70).

The Acting Regional Director's Report did not resolve certain factual matters. One witness stated that partisan Union materials had been distributed simultaneously with official government documents (A 47, 71, 72, 73). Yet, without finding any specific facts, the Report credits the Union's assertion that the materials were distributed at different times (A 48).

While the Acting Regional Director found payments to groups of employees had been made on at least two occasions, and the Union would "make it worth [an employee's] while" to attend a meeting, (A 51), it was not determined how many other employees were promised payments to attend the meetings.

The Acting Regional Director concluded that there was no evidence that employees, including those who received payments, had any reason to believe NLRB ratification or condonation of payments to employees (A 53). Yet, subsequently, an affidavit was submitted to the Board in which an employee stated he was promised payment at the same time the NLRB agent was in the room after he and the agent had shared a lunch paid for by

the Union. The employee states:

We were all still in the room when [Union representative] Bracha told me I would be receiving payment. I do not think the NLRB man heard . . . Yet I did not think that he would object since I assumed it was all right if Bracha paid us. I did, however, have some doubts about it. (A 86).

The Report acknowledged that the \$20 payments were "excessive", but concluded the excess was not improper because it was due to an "honest mistake" by the Union (A 60).

The Acting Regional Director also was of the opinion -- although the meetings were designed to be on employees' free time -- that the \$20 payments were not improper because they were "at a rate roughly comparable to or at least not "grossly disproportionate" to wages the employee earned elsewhere." (A 60).

It appears that the Acting Regional Director used the potential maximum pay rate for these employees as his basis for comparison. The Report states that the employees received from a \$2.31 minimum to slightly less than \$4.00 normal piece work rate per hour; none spent much more than two hours at the Union's meeting, and thus, were "overpaid by \$12.00." (A 59 fn 12). Thus, he concluded they had been paid 2 1/2 times their normal pay rate.

Yet, another section of the Report states the employees "spent between one and two hours." (A 51). Thus, if one were to use the minimum rate (\$2.31) and

the minimum time (1 hour), the conclusion could also be reached that employees were paid as much as 8 1/2 times their wage rate by the Union.

The Company filed timely exceptions (A 80), a brief (1-10), and an affidavit (A 86) with the Board requesting the election be set aside or a hearing be directed. The Board, however, merely adopted the Acting Regional Director's Report without comment on the issues raised herein and certified the Union (A 88).

The bargaining Order the Board seeks to enforce in this case is based on this certification.

ARGUMENT

THE COMPANY HAS NO OBLIGATION TO BARGAIN SINCE THE BOARD IMPROPERLY CERTIFIED THE UNION. THE BOARD SHOULD HAVE SET THE ELECTION ASIDE OR, AT A MINIMUM, DIRECTED A HEARING ON THE COMPANY'S OBJECTIONS.

I. THE COURT'S FUNCTION

The matter is before the Court pursuant to Section 10(e) of the National Labor Relations Act as amended. 29 USC Sec. 151 et seq. Section 10(e) is the result of the 1947 ("Taft-Hartley") amendments to the National Labor Relations Act (the "Wagner" Act). The Wagner Act provided that the Board's findings, if supported by evidence, "shall be conclusive". There was a prevailing view, in effect at the time of the NLRB v. A. J. Tower Co., 329 U.S. 324 (1946) case, cited by the Board in its brief at page 7, that the courts had abdicated their power of review to the Board. NLRB v. Standard Oil Co., 138 F2d 885 (2nd Cir., 1943). In the 1947 Taft-Hartley amendments, Section 10(e) was changed to require a closer review of Board decisions by the courts and broaden the scope of the courts' reviewing power. The circuit courts were to assume more responsibility for the reasonableness of the Board's findings. Universal Camera v. NLRB, 340 U.S. 474 (1951).

In other circumstances, this Court has made it clear that the judicial function is not to be a "rubber stamp" enforcing NLRB Regional Directors' administrative determinations. See Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, 494 F2d 1230, 1239 (2nd Cir., 1974).

The courts have been particularly reluctant to defer to the Board's certification of a Union without any hearing on objections when evidence has been presented that the Union made payments to employees during the election campaign, NLRB v. Commercial Letter, Inc., 455 F2d 109 (8th Cir., 1972), remanding 188 NLRB 827 (1971), on remand 200 NLRB 534 (1972), enf'd 496 F2d 35 (8th Cir., 1974).

When evidence has been presented that the conduct of a Board agent influenced employees to believe that he supported the Union, it would be inherently unfair for this Court to permit the results of his investigation to determine the matter. Evidence of the agent's conduct was presented to the Board but it felt the facts were not significant. (A 88, 89; A 4, 6).

When this court has validated Board certifications without evidentiary hearings on objections, it has done so in circumstances when it was clear that a hearing would not produce additional material facts, NLRB v.

Olson Bodies Inc., 420 F2d 1187, 1190 (2nd Cir. 1970)
(Respondent had examined Board affidavits), or the
issue raised was only speculative, Polymers Inc. v.
NLRB, 414 F2d 999 (2nd Cir., 1969) (Remote possibility
of someone entering a locked automobile and tampering
with a ballot box without leaving a trace).

Thus the Company maintains that the circumstances
of the case do not warrant the court's deferring to the
Board's opinion but require the Court to impose its own
judgment.

II. THE REQUIREMENT FOR
"LABORATORY CONDITIONS" IN ELECTIONS.

The standard of conduct to be met in an election campaign has been described by the Board in General Shoe Corp., 77 NLRB 124, 21 LRRM 1337 (1948) as follows:

In election proceedings it is the Board's function to provide a laboratory in which an experiment can be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of employees . . .

When the laboratory conditions do not exist the election experiment must be run again.

77 NLRB 124

The type of conduct which may interfere with the "laboratory conditions" for an election is more restrictive than that necessary for an unfair labor practice finding. Dal-Tex Optical Company, Inc., 137 NLRB 1782, 1786-87, 50 LRRM 1489 (1962).

III. THE UNION'S CASH PAYMENTS TO EMPLOYEES CONSTITUTED ELECTION INTERFERENCE

The courts have differed with the Board on the effect of a Union's promising or conferring benefits to employees who demonstrate support for the Union prior to an election.

In NLRB v. Commercial Letter, Inc., supra at 455 F2d 109, 114 the court refused to enforce a Board Order when a number of employees were reimbursed for lost wages when they were subpoenaed to attend a representation hearing. The court concluded an evidentiary hearing was necessary to determine if the employees were needed to testify and the length of time they spent.

In Collins & Aikman Corp. v. NLRB, 383 F2d 722, 728-729 (4th Cir., 1967) the court refused to enforce a Board Order when a Union promised an employee \$14.00 and paid an employee \$7.00 to act as its election observer. The employee had lost approximately \$2.00 wages for the time spent on behalf of the Union and thus received a \$5.00 benefit.

In a number of cases, circuit courts had disagreed with the Board's view that a waiver of Union initiation fees for employees who joined the Union prior to but not after an election did not create an undue influence on employees to vote for the Union. See,

Amalgamated Clothing Workers v. NLRB, 345 F2d 264, 268-269 (Judge Friendly, concurring), (2nd Cir., 1965); NLRB v. Gorbea, Perez and Morell, 328 F2d 679 (1st Cir., 1964). This issue was finally resolved in NLRB v. Savair Manufacturing Company, 414 U.S. 270 (1973) when the court, reversing the Board, found that the practice of waiving Union initiation fees for employees joining before an election would impose upon employees a feeling they were obligated to vote for the Union. The court, at 278 fn 6, cited with approval the Commercial Letter, Inc., supra, and Collins & Aikman, supra, cases. The court also cited with approval a series of Board cases in which elections had been set aside because of a Union's promising or conferring benefits on employees. e.g. Wagner Electric Corp., 167 NLRB 532, 533, 66 LRRM 1072 (1967) (grant of life insurance); General Cable Corp., 170 NLRB 1682, 67 LRRM 1635 (1968) (\$5.00 gift to employees even when not conditioned on outcome of election); Teletype Corp., 122 NLRB 1594, 43 LRRM 1342 (1959) (payments of money by rival unions to those attending pre-election meetings).

It is significant to note that even though he dissented in Savair on the influence of an initiation fee waiver on employees, Mr. Justice White pointed out that

cash payments presented a different problem:

It is certainly arguable that such a connection [between a Union inducement and the employee's vote] can be made when the union pays a person cash to vote for or assist the union. The benefit of the union has been tendered and the employee may well feel he has incurred a moral obligation to vote for the union. See, e.g., Wagner Electric Corp., 167 N.L.R.B. 532, 533 (1967) (grant of life insurance policy to those who signed with union before representation election "subjects the donees to a constraint to vote for the donor union"). See also, Collins & Aikman Corp. v. NLRB, 383 F.2d 722 (CA4 1967) (payment of \$7 to employee to be observer at election); NLRB v. Commercial Letter, Inc., 455 F.2d 109 (CA8 1972) (excessive payments to union members to attend meetings). 414 U.S. at 288 n.7, 504.

In Plastic Masters v. NLRB, 512 F.2d 449, 450, 451 (6th Cir. 1975), the court followed Collins & Aikman, supra, and Savair, supra, in refusing to validate a Board certification when an employee was paid less than twice his "lost" wages for serving as the Union's election observer.

Yet, in the instant case, the Acting Regional Director concluded that the payments to employees, including the \$20 payments, (which were at least 2-1/2 times and possibly 8-1/2 times their wage rates) were not improper. He relied on the Board's pre-Savair decision in Quick Shop Markets, 200 NLRB 830, 81 LRRM 1599, (1972), 204 NLRB 1150, 83 LRRM 1579, (1973) enf'd w.o. opinion 492 F2d 1248 (8th Cir., 1974),

(A 60) in which the Board, despite a strong dissent, did not sustain objections when employees were paid \$15 for 4-1/2 hours work as Union election observers or about twice their normal pay rate. The Acting Regional Director also relied on Board cases in which the Board had approved reimbursement of normal wages to election observers, GTE Lenkurt, Inc. 209 NLRB 473, 86 LRRM 1205 (1974), or had made minimal payments to employees, Jat Transportation, Inc., 131 NLRB 122, 48 LRRM 1038 (1961) (\$2 "lunch money" for attending meeting), Federal Silk Mills, 107 NLRB 876, 33 LRRM 1245 (1954) (\$3 reimbursement to car pool drivers for expenses with specific Union disclaimer of any intent to influence votes).

Initially, the Company contends that the cases relied on by the Acting Regional Director and the Board are not applicable to the circumstances of the instant case.

The employees in Commercial Letters, supra, were subpoenaed to attend a formal hearing and were only reimbursed for their lost wages. In Quick Shop Markets, and G.T.E. Lenkurt, the employees had "lost" wages by serving as election observers. The payments by the Union were only intended to reimburse employees.

The Company contends that if this court is to sanction reimbursement for election observers it should follow the standard proposed by former NLRB Chairman

Miller in his dissenting opinion in Quick Shop Markets,
supra.

In my view, any time an employer or a union offers an observer an extra payment over and above reimbursement at his regular rate of pay plus expenses, there is a lurking danger that, no matter how pure the heart of the payor, such payments will be regarded by the recipient as a form of monetary inducement to demonstrate his support of the paying party's cause and also as an inducement to secure his unspoken commitment to vote in the manner desired by the payor.

In order to protect the integrity of our processes, I would set aside this election and any other one in which payments of this kind were made.

81 LRRM 1599, 1560

In the instant case the payments were not designed to reimburse employees for their expenses. The Union's meetings were set for the employees' free time and thus the payments were specifically aimed at providing a benefit or, in the words of the Union intermediary, "making it worth the [employees'] while" to attend. (A 51). Furthermore, even the Acting Regional Director's computation of payments at 2-1/2 times normal wage rate exceeds the Plastic Masters, supra, and Collins & Aikman, supra, standards and exceeds any standard approved by any court. If a minimum wage and minimum time formula is used, the Union's payments would be determined to be 8-1/2 times the employees' wage rate. Thus, the Company contends that the payments were disproportionate and should not be sanctioned.

Secondly, in the circumstances of this case, the Union's cash payments, as Mr. Justice White feared in Savair, pose even a greater danger. In the cases relied on by the Board, employees were reimbursed for participating in hearings and elections - public governmental functions. In the instant case, employees were paid to meet with the Union at Union headquarters. While the purpose of the meetings was assertedly to submit information to the NLRB agent, it is not clear that that was the only purpose of the meetings. In fact, at one meeting, no NLRB agent was present. It would seem obvious that at least part of the Union's meeting would be devoted to the Union's organizational objective. Approval of these payments would permit a Union, anytime an unfair labor practice charge is filed - a frequent occurrence during election campaigns - to pay employees to attend Union meetings or demonstrate their support of the Union - practices which are prohibited. Savair, supra; Wagner Electric Corp., supra; General Cable Corp., supra; see also NLRB v. Exchange Parts Co., 375 U.S. 405 (when a Company \$10 benefit to employees was found improper).

Thus, the Company contends that the cash payments to employees imposed a "moral obligation" on employees to vote for the Union and improperly affected the

results of the election in which the Union achieved a single vote majority. Savair, supra; Collins & Aikman, supra; Plastic Masters, supra.

2

NLRB v. Basic Wire Products, Inc., 516 F2d 261, 265 (6th Cir., 1975) cited by the Board in its brief at page 14 is not applicable. In that case the payment was merely a reimbursement for expenses and was purposely deferred by the Union until after the results of the election were known. There was no assertion that the payment influenced the election results.

IV. EMPLOYEES WERE GIVEN THE IMPRESSION OF
NLRB OR U. S. GOVERNMENT ENDORSEMENT OF THE UNION

In Athbro Precision Engineering Corp., 166 NLRB
No. 116 (1967) the Board established a rule of conduct
for its agents involved in the election process:

The Board in conducting representation
elections must maintain and protect the integrity
and neutrality of its procedures. The commission
of an act by a Board Agent conducting an election
which tends to destroy confidence in the Board's
election process, or which could reasonably be
interpreted as impugning the election standards we
seek to maintain, is a sufficient basis for setting
aside that election.

166 NLRB No. 116

Thus, in Athbro the Board set aside an election
when a Board Agent drank beer with a Union represent-
ative between voting periods even though there was no
demonstrated³ effect on the employee's voting.

This requirement of the Board of protecting its
neutrality was found to have been breached when a Board
Agent, in the process of investigating an unfair labor

³
NLRB v. Athbro Precision Engineering Corp., 423
F2d 573 (1st Cir., 1970), cited by the Board in
its brief at page 28, does not, as suggested,
demonstrate approval of this conduct. The court
found that the Board had made the correct decision
by setting the election aside, but decided to
enforce the Board order since neither the Board
nor the employer involved had appealed an arguably
improper district court injunction ordering the
Board to certify the election results.

practice charge, permitted himself to be introduced to employees meeting with a Union representative, even though the only purpose of the Union's action was to determine if any employees could offer information to the agent in support of the charge. The court concluded that NLRB neutrality in fact or in appearance had been so compromised that a new election was necessary.

Provincial House Inc. v. NLRB, No. 76-1470, 82LC " 10,282 (6th Cir., December 30, 1977) (attached hereto in the Addendum).

In the instant case, the Board agent investigating the unfair labor practice clearly exceeded the bounds of neutrality. He not only, in the presence of employees, shared in the gratuity of a free lunch paid for by the Union, but by his statement that "we will get [the Company president]" undisputedly created the impression in an employee that he was "against" the Company and was "on the [Union's] side." (A 87).

The Union's communication to employees on February 23, 1976 that the NLRB was "getting information" in support of the Union's charges (A 48) and its March 10, 1976 communication that the "UAW and/or the United States Government" guaranteed certain benefits if employees voted for the Union only reinforced this impression of government endorsement. Finally, the distribution of partisan Union materials with government

documents and the defacing of the official election notices by the marking of the "Yes" box further contributed to this impression in employees.

In this combination of circumstances, the acts of the Union and the unwitting conduct of the Board Agent compromised in fact the appearance of Board integrity and the election should be set aside. Provincial House v. NLRB, supra.

V. AS A MINIMUM, THE BOARD SHOULD HAVE DIRECTED
AN EVIDENTIARY HEARING ON THE OBJECTIONS

In reviewing Board decisions concerning objections dealing with payments to employees, the courts have noted the importance of an evidentiary hearing in order to determine if there has been an improper effect upon employees. Commercial Letter, Inc., supra; Collins E. Aikman Corp., supra; Plastic Masters, supra. Even in Quick Shop Markets, Inc., supra, which the Board cites to support its position, an evidentiary hearing was held.

Here the Board, for the first time, is asking a court to approve its certification of a Union without a hearing when there is evidence of "excessive" pre-election payments to employees.

The Company maintains that the undisputed facts -- the payments to employees and the impression of government endorsement of the Union which was aided by the NLRB agent -- warrant setting the election aside. Yet, even if this conclusion were not reached, sufficient evidence was presented to require a hearing.

A hearing would be necessary not only because of the indicated or potential bias of the NLRB agent, but because of the nature of the objections. Union payments to employees were established. The extent of payments is knowledge solely in the possession of the Union. Yet, in the absence of a hearing, the company is prevented from bringing all of

the relevant facts to light. The Board has no pre-hearing discovery procedures. It imposes restrictions on employers' inquiries of employees in matters relating to Union organizational activities. Johnnie's Poultry Co., 146 NLRB 770, 774, 556 LRRM 1403 (1964) enf. denied 344 F2d 617, (8th Cir., 1965). Thus, even though the courts may not approve of these restrictions, see Bourne v. NLRB, 332 F2d 47 (2nd Cir., 1964), a company, acting under the jurisdiction of the Board, takes great risks in attempting to elicit information from employees.

With the opportunities for subpoena and cross examination, which do not arise until after a hearing is directed, the exact nature and impact of the payments could be developed and the record could be made complete.

CONCLUSION

For each of the foregoing reasons, the Board Order should not be enforced.

Respectfully submitted,

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ADDENDUM

288 1-13-78

Labor Cases—Cited 82 LC
Provincial House, Inc. v. NLRB

17,089

the charge. The Union's business agents were clearly the most culpable parties involved.² However, their reign of coercion and terror would have been shorter had the Union members insisted on their removal long before they did and had the employers with whom they dealt, including AFC, refused to be coerced or intimidated.

We also find no error in the Board's refusal to order the charge against AFC dismissed.³ Once the Board's jurisdiction is invoked by a valid charge, the determination whether to proceed rests in the sound discretion of the General Counsel. See *Braden v. Herman*, [69 LC ¶13,052] 468 F.2d 592 (8th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973). Once an unfair labor practice charge is filed, the General Counsel proceeds in the public interest not just in vindication of private rights. We recognize Jackman was mistakenly informed that he would be permitted to withdraw the charge at any time he saw fit. It is a mistake that the General Counsel should not permit to be repeated. However, we cannot permit that mistaken representation to deter the General Counsel from proceeding against AFC when it is clear that it was guilty of unfair labor practices along with the Union. The public interest requires no less.

[Completion of Work]

We finally find no merit in AFC's contention that the Board's order is moot.⁴ The termination of a construction project by a joint venture does not moot a case in the Court of Appeals. See *Local 74, U. Br. of C. v. NLRB*, [19 LC ¶66,349] 341 U.S. 707, 715 (1951); *Plasterers Local Union No. 79, Op. P. & C. M. I. A. v. NLRB*, [63 LC ¶10,993] 440 F.2d 174, 179 (D.C. Cir. 1970), *rev'd on other grounds*, [66 LC ¶12,247] 404 U.S. 116 (1971); *NLRB v. Plumbers Union of Nassau County, Local 457, Etc.*, [44 LC ¶17,421] 299 F.2d 497, 501 (2d Cir. 1962). To hold otherwise would frustrate the remedial purposes of the Act.

The precise extent to which the order can be enforced is a matter properly left for determination by the Board at the compliance proceedings which will follow this appeal. See *Golden State Bottling Co. v. NLRB*, [72 LC ¶14,124] 414 U.S. 168 (1973); *NLRB v. Autotronics, Inc.*, [64 LC ¶11,332] 434 F.2d 651 (8th Cir. 1970). We note for emphasis, however, that the Board held that the Union is primarily responsible for the back pay award and its assets must be expended before resort is had to the assets of AFC or the companies that comprised the joint venture.

[¶10,282 *Provincial House, Inc., Petitioner v. National Labor Relations Board, Respondent.*

United States Court of Appeals, Sixth Circuit. No. 76-1470. December 30, 1977.
Petition to Review an Order of the National Labor Relations Board.

National Labor Relations Act

Election Interference—Neutrality of Investigator—Introduction at Union Meeting.—The NLRB's neutrality was compromised when a Board agent investigating unfair labor practice charges took affidavits from employees at the rear of a restaurant room, then went to the front of the room and allowed himself to be introduced to employees meeting with a union agent. The union agent then explained the nature of the charges being investigated and asked those present whether they had any more relevant information. There was a *per se* violation of the Board's neutrality rule when the investigator allowed himself to be introduced to the organizational meeting. A new election was

² In *United States v. Kelley*, 545 F.2d 619 (8th Cir. 1976), *cert. denied*, 51 L. Ed. 2d 777 (1977), Fred D. Kelley and Paul P. Menz were convicted of conspiracy to restrain, coerce and intimidate members of a labor organization and interfering with rights of union members. Their conviction was upheld by this Court.

³ The administrative law judge mistakenly held that he was without jurisdiction to dismiss the charge against AFC. See National Labor Relations Board, Rules and Regulations, Series 8, as amended 29 C.F.R. §§102.24, 102.25 and 102.35; *Local 638, United Assn. of Journeymen*, [1966 CCH NLRB ¶20,489] 158 NLRB No. 140, 62 L.R.R.M. 1219 (1966). The Board recog-

nized this error in its opinion. It properly held, however, that the issue could not be raised before the Board since the charging party did not except to the administrative law judge's ruling on that issue.

⁴ AFC bases its contention on the following facts: (1) AFC has completed work at the project site and the joint venture no longer exists as a legal entity; (2) the joint venture no longer employs any members of the Local and it does not have any employees on the project site where the incident occurred; and (3) AFC no longer transacts business within the area of the project site or the Eighth Circuit.

Labor Law Reports

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required, even though only 18 employees were present and the union won the first vote by a margin of 52-17. NLRA, Sections 9(c) and 10(c). Back references.—¶ 2795.36 and 5525.05.

Denying enforcement of (1976) 222 NLRB — (No. 207), 1975-76 CCH NLRB ¶ 16,681.

Julius M. Steiner (Pechner, Dorfman, Wolfe, Rounick & Cabot), Philadelphia, Pennsylvania, Jerald R. Cureton, for Petitioner. Elliott Moore, Deputy Associate General Counsel, Washington, D. C., Vivian A. Miller, Bernard Gottfried, Detroit, Michigan, for Respondent.

Before EDWARDS and ENGEL, Circuit Judges and GRAY,* Senior District Judge.

[Statement of Case]

EDWARDS, C. J.: Petitioner, Provincial House, Inc., a nursing home located in Cass City, Michigan, petitions for review of a National Labor Relations Board order finding an unfair labor practice in petitioner's failure to bargain with a union which had been certified after winning an NLRB election. The Board filed a cross-petition for enforcement. The Board's order is reported at [1975-76 CCH NLRB ¶ 16,681] 222 NLRB No. 207 (1976).

The most important issue presented is petitioner Provincial's contention that a Board employee, investigating unfair labor practice complaints, failed to observe the required neutrality of the Board's procedures. The facts pertaining to this issue are essentially undisputed and are set out below from the Hearing Officer's Report and Recommendation, which was adopted by the Board:

With the exception of conflicting testimony as to certain remarks, the facts offered at the hearing in support of Objection 2 are virtually without dispute. Thus, sometime in February, 1975, subsequent to the filing of the petition in this matter, the Petitioner also filed unfair labor practice charges in Case No. 7-CA-11773 involving the Employer's Cass City facility. The Petitioner's National Representative, Thomas Wojtala, had made arrangements with Board Agent Gregory Muzingo, who had been assigned to investigate the unfair labor practice case, to interview Petitioner's witnesses on February 25, 1975. The arranged meeting place was the Wildwood Farms Restaurant at the intersection of M-81 and M-53, immediately outside Cass City, Michigan. The Wildwood Farms Restaurant from testimony, is a dual-level establishment. The upstairs area is comprised of two dining rooms with a bar in addition. The lower level consists of a meeting room which was described as

approximately 25 feet by 50 feet in dimension.

Board Agent Muzingo was to meet the first witness to be proffered by the Petitioner in support of the charges at approximately 1:00 P. M. on that date. At approximately that time on February 25, 1975, Wojtala met Board Agent Muzingo at the restaurant and also found there two unit employees waiting to give affidavit testimony to the Board agent in support of the unfair labor practice case. Between 1:00 P. M. and 2:00 P. M., Board Agent Muzingo secured affidavit testimony from the first two employee witnesses, in the upstairs dining area of the restaurant. At approximately 2:00 P. M., as additional employees began to arrive, and in view of the fact that there were still other, non-involved, customers in the restaurant, Wojtala suggested that they all retire to the downstairs meeting room. In that lower level, Board Agent Muzingo, at a table at the extreme rear of the meeting room, continued his taking of affidavit testimony from employee witnesses as they arrived. Apparently, Wojtala had not made the arrangements for the specific employees to be interviewed by Muzingo. These arrangements had been made by employee adherents of the Petitioner.

During the time Board Agent Muzingo was securing affidavit testimony from employee witnesses at the rear of the downstairs meeting room, at the front, Wojtala proceeded to answer employee questions concerning the Petitioner's organizing campaign and the election. Wojtala testified that during the course of that afternoon and until 5:00 P. M., approximately 30 unit employees came and went. Wojtala also advised arriving employees that, if they desired drinks, including alcoholic beverages, they could go to the bar upstairs, tell the bartender that the drinks were to be charged to Wojtala, and return downstairs with them. Wojtala admitted that several employees accepted his offer. No evidence was pre-

* Honorable Frank Gray, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

sented that Board Agent Muzingo either participated in the question and answer discussions conducted by Wojtala or had any kind of beverages. With the exception of one incident to be described hereinbelow, Board Agent Muzingo and Petitioner Representative Wojtala did not converse in the meeting room until Muzingo left between 4:30 and 4:45 P.M. that afternoon, after having secured six to eight employee affidavits.

About 4:00 P.M., Muzingo came to the front of the room, where Wojtala was speaking to approximately 18 employees and inquired whether an additional employee witness he was scheduled to meet had arrived. Wojtala told Muzingo that the employee he inquired about had not yet arrived. Wojtala then introduced Board Agent Muzingo to the employees present as an NLRB agent. According to Wojtala's best recollection, he then explained to the employees that the Petitioner had filed unfair labor charges against the Employer and explained the nature of those charges. He then told the employees that Board Agent Muzingo was presently investigating those charges and asked whether there was anyone else present who could possibly offer information in support of those charges. One employee volunteered to do so and accompanied Muzingo to the rear of the meeting room where Muzingo proceeded to take that employee's affidavit testimony. A few moments later, the last-scheduled witness arrived and Muzingo also interviewed that employee prior to leaving.

We measure the facts in this case against the Board's own rule:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election. *Athbro Precision Engineering Corp.*, [1967 CCH NLRB ¶21,681] 166 NLRB No. 116 (1967), *vacated*, *IUE v. NLRB*, 67 L. R. R. M. 2361, 57 LC ¶12,440 (D. D. C. 1968), *acquiesced in*, [1968-1 CCH NLRB ¶22,411] 171 NLRB No. 4 (1968), *enforced*, *NLRB v. Athbro Precision Engineering Corp.*, [62 LC ¶10,651] 423 F. 2d 573 (1st Cir. 1970).

The facts show that the episode described above took place in the midst of the campaign preceding the NLRB election. The

group of employees to whom the NLRB representative was introduced was 18 in number. The election took place 10 days later and the union won it by a substantial majority, 52-17. Thereafter, the employer contested the election and lost before the Board, and since has refused to comply with the NLRB's bargaining order in order to contest the Board's certification of the election results.

[Organizational Meeting]

Contrary to the majority of the Board, we feel that the Board representative, whether inadvertently or not, allowed himself to be used in a manner which seriously affected the neutrality of the Board's procedures and that the conduct disclosed requires that this court refuse enforcement of the bargaining order pending another election.

We would like to be specific about the precise conduct which we feel carried the activity of the NLRB representative past the point of arguably defensible conduct, so as to represent a *per se* violation of the Board's neutrality rule. That point in our view came when the NLRB representative allowed himself to be introduced to the union organizational meeting.

We recognize that investigating unfair labor practice complaints is an important NLRB function which cannot be performed in a vacuum, that meeting halls are few in small towns like Cass City, and that union representatives are likely sources of information about witnesses concerning such complaints. While it would doubtless be preferable to keep unfair labor practice investigations completely separate in time and place from NLRB elections, the Board may find that degree of separation of its functions impossible in a real world. See *Amax Aluminum Extrusion Products v. NLRB*, [1968-2 CCH NLRB ¶20,092] 172 NLRB No. 149 (1968); *Isaacson-Carrico Mfg. Co.*, [1973 CCH NLRB ¶24,879] 200 NLRB No. 116 at 798-802 (1972).

Nonetheless, it should be possible for any NLRB representative to keep from becoming a part of a union organizing meeting. And when such a representative (voluntarily or involuntarily) becomes a part of such a meeting (absent extraordinary circumstances¹), we think that NLRB neutrality, in either fact or appearance, has been so compromised as to warrant setting aside the election and holding a new one.

¹ An example might be the investigation of an unfair labor practice complaint that company-

inspired violence had broken up previous union meetings.

While we agree with the Board that the size of the union majority in this case was such as to make it quite unlikely that the NLRB representative's appearance at the meeting had any decisive effect on the result, we do not think that is the issue in this case. What we deal with here is an act by a Board Agent which tends to destroy "the neutrality of the Board's procedures." *Athbro Precision Engineering Corp.*, 166 NLRB No. 116, at 966 (1967).

In view of our decision on this issue, we reach no other issues sought to be presented.

The Board's petition for enforcement is denied, petitioner Provincial House, Inc.'s petition is granted, the Certification of Election is vacated, and the case is remanded to the Board for the prompt holding of a new election.

[¶ 10,283] *Noland Coles, Plaintiff v. Sunshine Biscuits, Inc., Defendant.*

United States Court of Appeals, Second Circuit. No. 77-6018. July 12, 1977.

Appeal from the United States District Court for the Eastern District of New York.

Vietnam Era Veteran's Readjustment Assistance Act

Reemployment of Serviceman—Discharge for Absenteeism—Notice of Enlistment.—

It was not clearly erroneous to decide that an ex-serviceman was not entitled to reemployment where his former employer had discharged him for excessive absences before he went on active duty and before the employer received notice of the man's enlistment. 38 U. S. C., Section 2021. Back reference.—¶ 6760.27.

Affirming (DC NY 1976) 80 LC ¶ 11,860.

Before WATERMAN, SMITH and OAKES, Circuit Judges.

[Statement of Case]

PER CURIAM: This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by the appellant pro se and by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the appeal from the judgment of said district court is affirmed upon the opinions of Judge Dooling dated December 13, 1976, and January 18, 1977 (No. 76 C 1376).

[¶ 10,284] *Island Creek Coal Co., et al., Plaintiffs-Appellees v. Local 1827, United Mine Workers of America, Defendant-Appellant.*

United States Court of Appeals, Sixth Circuit. No. 76-1652. December 30, 1977.

Appeal from the United States District Court for the Eastern District of Kentucky.

Labor Management Relations Act

Contempt Proceedings—Strike Ban Breach—Vacate and Remand as New Decisions.

—Determinations of contempt arising out of a strike in violation of a permanent injunction were vacated and remanded where the district court did not have the benefit of subsequent cases that were relevant to the contempt hearings. LMRA, Section 301. Back reference.—¶ 6060.935.

Robert J. Greene and Paul D. Deaton, Paintsville, Kentucky, for Defendant-Appellant. D. B. Kazee and Fred G. Francis (Francis, Kazee & Francis), Prestonburg, Kentucky, for Plaintiffs-Appellees.

Before EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

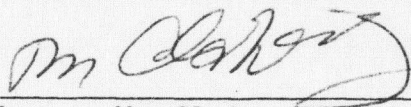
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4201
	)	
BRISTOL SPRING MANUFACTURING	)	
COMPANY,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) copies of Respondent's brief in the above-captioned matter have this day been served by first class mail upon the following counsel at the addresses below:

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Dated this 9th day of March,
1978.